IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI	)	No. WD81759
Respondent,	)	
	)	
vs.	)	
	)	
PATRICIA ANN PREWITT	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI, THE HONORABLE ROBERT L. KOFFMAN, CIRCUIT JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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INTRODUCTION

Patricia (Patty) Prewitt has spent over thirty-two years of a life sentence in prison for the murder of her husband Bill, a crime she has consistently maintained she did not commit. Last year Mrs. Prewitt learned for the first time, despite repeated earlier requests, that evidence secured in relation to her husband's murder still exists and remains in possession of the Johnson County, Missouri Sheriff's Office. Mrs. Prewitt seeks DNA testing of this evidence under Mo. Rev. Stat. § 547.035. Such testing—using technology not available at the time of her trial in 1985—could corroborate her account of events and identify the actual perpetrator, proving Mrs. Prewitt's innocence. Despite the powerful probative nature of this evidence, the circuit court improperly denied Mrs. Prewitt's motion for DNA testing when it 1) applied the incorrect legal standard in its denial of testing, and 2) relied on factual errors and extrajudicial information in reaching its decision, thus failing to appear impartial in assessing Appellant's motion. Mrs. Prewitt asks this Court to correct the errors made by the circuit court below and grant her the opportunity she is entitled under Section 547.035 to conduct DNA testing on key pieces of evidence that could prove her innocence.

REQUEST FOR ORAL ARGUMENT

Appellant Patricia Prewitt respectfully requests this Court grant oral argument in this case.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the Circuit Court of Pettis County, Missouri on May 3, 2018, denying Appellant's motion for post-conviction DNA testing pursuant to Mo. Rev. Stat. § 547.035. (LF29; App. A3-A8)[1]. Appellant filed a timely notice of appeal on May 11, 2018. (LF31). This appeal does not involve any matter within the exclusive jurisdiction of the Supreme Court. Accordingly, this Court has appellate jurisdiction over this case pursuant to Article V, Section 3, Constitution of Missouri (1945), as amended.

[1] References to the Legal File in this case will be designated with "LF" to denote the document number in the Legal File, followed by the page number, where applicable. References to the Appendix will be designated by "App." followed by the page number.

STATEMENT OF FACTS

High school sweethearts William (Bill) and Patricia (Patty) Prewitt married in 1968. (TT Vol. 3, 572).[2] The Prewitts were active in their small community of Holden, a town with 2000 residents roughly fifty miles outside of Kansas City. By 1984, they had five school-aged children and owned and operated a lumberyard in the center of town. In the early morning hours of February 18, 1984, Patty and Bill returned to their home after a night of socializing with friends. Bill went to bed after checking on their children and Patty followed after placing some dishes in the kitchen sink. (*Id.* at 602). What happened next is the primary source of dispute in this case. As described in greater detail below, Patty maintains that an intruder murdered her husband in their bed and attacked her before fleeing the scene. The State argued to the jury that Patty Prewitt murdered her husband and "set the stage" to make it seem like an intruder murdered Bill and attacked her by inflicting marks on her throat, severing the phone line, and hiding the murder weapon. (TT Vol. 4, 660-61.). What is not disputed is that Bill Prewitt was shot in his bed and that Patty sustained injuries.

[2] "TT" indicates a reference to the trial transcript from the original trial of *State of Missouri v. Patricia Ann Prewitt*. The trial transcript was originally filed in case WD37196. It was transferred to and made part of the record in this case by order of this Court on June 12, 2018.

The Investigation

At approximately 4:40 AM on February 18, Johnson County Deputy Sheriff and lead investigator Kevin Hughes arrived at the Prewitt home and conducted a brief survey of the murder scene. (TT Vol. 2, 255-56). Patty was at the home of a neighbor, where she had driven herself and the children to seek help. (TT Vol. 3, 608-09). Hughes drove to the neighbor's home to interview Patty with his colleague, Deputy Doug Rusher. (LF21 at 8, Ex. B). Still dressed in the flower print pajamas she wore to bed, Patty shared her account with the investigators. (TT Vol. 2, 274-77). She told Hughes and Rusher that she woke up to what she thought was a clap of thunder. (LF21 at 8, Ex. B). She was grabbed by her hair, and thrown to the floor by a man who then pulled down Patty's pajama bottoms and panties and held a knife to her throat. (TT Vol. 2, 277). After the attempted rape, the assailant departed down the stairs. (LF21 at 9, Ex. B). Patty checked on her husband who was incapacitated by the injuries he had sustained. (*Id.*). The lights were inoperable, as were the phones. (*Id.*). She gathered the children and left to seek help. (*Id.*). Patty had cuts on her neck. (*Id.* at 8). She did not receive medical attention for these wounds.

Subsequent actions by Deputy Hughes and his colleagues fell into a pattern of investigative tunnel vision, and in the critical early hours of the investigation, they focused all their resources on the theory that Patty was the perpetrator. As a

result, no efforts were made to collect or examine evidence that could identify another suspect. Leads that pointed to another suspect were not followed. Indeed, Hughes later revealed he had arrived on the scene already thinking about a statistic that seventy-five percent of murders are committed by a family member or friend of the victim. (TT Vol. 2, 328-29). After his initial interview with Patty at her neighbor's house, Hughes returned to the Prewitt home. Little physical evidence was collected in these crucial, early hours of the investigation, even though much could have been preserved, such as fingerprints, hair, and footprints. The small amount of evidence that was collected was inadequately analyzed.

Fingerprints, for example, were not collected from anywhere in the bedroom or from the breaker box, which was the site where electric power to the house was cut. (*Id.* at 316-17). Reports made at the time by investigators do not note any effort to collect fingerprints or search for hairs in the bedroom (*Id.* at 327). In fact, while Hughes described at trial a tepid effort to dust a few doorknobs, not a single fingerprint card or hair sample was lifted from the entire house (TT Vol. 2, 306-27). In a report written over a year later, just prior to trial, Hughes claimed that he had searched for hair to verify Patty's account of being pulled from bed by her hair, but no quantities of hair were discovered. (LF21 at 12, Ex. C). Contemporaneous records made at the time of the investigation do not support this assertion; no written records indicate that any such search was conducted. (TT Vol.

2, 325-27). At trial, Hughes claimed that he saw hairs embedded in the bedroom carpet, but they appeared to him to have been there for a long period of time. (*Id.* at 324). Mary O'Roark, Patty's friend and neighbor, cleaned the bedroom after the Sheriff's Office released the crime scene to the Prewitt family. O'Roark testified at trial that she had vacuumed hair off the bedroom floor. (TT Vol. 3, 551). Footprints were also not collected or analyzed.

The lack of thorough evidence collection at the crime scene is further demonstrated by the way in which a shell casing from the apparent murder weapon was discovered. Roughly eleven hours after the crime scene had been secured, a detective found it only because it fell out of a wicker loveseat that he sat on in the bedroom (TT Vol. 1, 192-96).

Instead of thoroughly documenting and collecting evidence at the crime scene, Hughes collected Bill Prewitt's life insurance policy, which listed Patty as the beneficiary, as well as over a dozen Alfred Hitchcock mystery novels (TT Vol. 2, 331-33). Hughes testified he was going to read them to see if anything in the books was similar to what took place in the murder of Bill Prewitt. (*Id.* at 333). It is noteworthy that the investigators looked to fictional material for answers while failing to collect concrete evidence at the crime scene.

Indeed, exculpatory evidence in the Prewitt case was ignored or explained away as immaterial. For example, Deputy Rusher conducted interviews with the

Prewitt children on the first day of the investigation. Sarah Prewitt, age 12, and the oldest child present in the home at the time of the murder, described being awoken in her upstairs bedroom by her mother that morning. (LF21 at 16, Ex. D). Her mother told her that there had been a fire and Sarah rushed downstairs. (*Id*.) While Sarah was waiting at the foot of the stairs, she heard a noise that sounded like rattling or someone banging on tin coming from the basement. (*Id*.) Sarah also shared that she thought her dad was downstairs because she saw a light coming from beneath the basement door. (*Id*.) Because power to the house had been cut, the light indicates that someone was in the basement with a flashlight or other light source. There is no record of any subsequent search of the basement as a result of Sarah's comments. In his closing argument, the prosecutor dismissed Sarah's account since it was given "after being in the custody of her mother," implying that Patty had pressured her daughter to make the comment (TT Vol. 4, 698). Investigators dismissed Sarah's account from the outset.

Additionally, a Prewitt neighbor, Ethel Juanita Stephens, testified in a hearing for a new trial that she spoke with the sheriff within a day or two after the murder to tell him that she had seen a suspicious vehicle on the desolate road facing the Prewitt home approximately two hours before the murder took place (*Id.* at 719-23). There is no indication that the Sheriff's Office conducted any investigation based on this information, nor was this information shared with the

defense. The sheriff later stated that he did not recollect receiving such information, even though the investigative records include a lead related to a car on the road at the time of the murder. (*Id.* at 732; LF21 at 20, Ex. E). It is not clear if this lead is related to Stephens's report, but this lead was marked in investigators' records as "void not issued." (LF21 at 20, Ex. E). Ultimately, the jury never heard Stephens's account of the suspicious vehicle as the motion for a new trial was denied by the trial judge.

On Sunday, February 19, the day after Bill Prewitt was murdered, Kevin Hughes convened the Rural Missouri Major Case Squad, as is common in rural counties with relatively small police forces. Approximately twenty-five officers from law enforcement offices across west central Missouri met for an initial briefing on the case from Johnson County Sheriff Charles Norman and from Hughes. At a time when critical physical evidence still remained uncollected and leads about an intruder uninvestigated, records indicate that the efforts of investigators focused primarily on information about Patty's extramarital affairs while she and Bill had been separated, and Bill's life insurance coverage. Officers conducted numerous interviews to discuss second or third-hand accounts of Patty's past affairs. (LF21 at 29-31, Ex. G; LF22 at 1-3, Ex. G). By that Sunday, at least five individuals shared rumors that Patty had boyfriends and/or was a flirt in response to investigators' questions. (LF21 at 29-31, Ex. G; LF 22 at 1-3, Ex. G)

Such single-minded fixation on rumors of years-old affairs as a possible motive for Patty to harm Bill, and as a means to assassinate her character, deterred law enforcement from following concrete leads that would identify a suspect.

Indeed, three days after the murder, on February 21, critical latent fingerprint evidence sat uncollected from both the house and the basement. Investigators recovered a gun that appeared to be owned by the Prewitts from a pond on their property and discovered footprints nearby that allegedly matched Patty's boots. The prints cannot be placed within any probative timeframe as it would be expected that Patty's prints would be on her own property, but investigators were unable to shake loose of their singular focus. Patty was arrested on February 22.

The State's Shifting Accounts Regarding Bill Prewitt's Cause of Death

An autopsy was conducted on the body of Bill Prewitt on February 18, 1984 by L. Kirk Arnold, M.D. (TT Vol. 2, 358). Dr. Arnold concluded that Bill Prewitt's death was caused by a single gunshot wound to temple. (*Id.* at 365). In late 1984, for reasons not explained at trial, lead investigator Kevin Hughes sought the opinion of Dr. James Bridgens on the cause of Bill Prewitt's death. (TT Vol. 3, 484). Bridgens has been the subject of criticism for his errors in other murder cases. *See, e.g.*, Bill Norton, A Difference of Opinion, Kansas City Star Magazine, Jan. 24, 1988, at 16-17; (LF22 at 5-8, Ex. H). Bridgens reviewed materials related

to Bill Prewitt's death and issued a report on March 15, 1985 in which he concluded that Prewitt died of two gunshot wounds to the head, the previously known wound to the temple as well as a second wound through the mouth. (TT Vol. 3, 485). Bill Prewitt's body was exhumed and a second autopsy was conducted less than three weeks before trial on March 28, 1985. (TT Vol. 2, 366). No members of Mrs. Prewitt's defense team were present for the exhumation and autopsy. In that autopsy, Dr. Bridgens and Dr. Arnold determined that Bill Prewitt died of two gunshot wounds to the head, the previously known wound to the temple and a second wound behind his right ear. (TT Vol. 2, 366-67; TT. Vol. 3, 465-66). This new theory, that Mr. Prewitt died as a result of the shot to the temple and to the ear rather than to the temple and the mouth—developed just weeks before trial, would become a key part of the State's case against Mrs. Prewitt. The State use this new theory to argue that Patty must have been the shooter based on her account to police of when Bill was still breathing.

The Trial

At trial, The State's case relied on the absence of evidence of an intruder. Of course, evidence that would exculpate Patty was not available at trial because investigators failed to collect it. The State mischaracterized the police investigation as including "a complete and through examination of the house from top to bottom [that] was conducted by the officers." (TT Vol. 1, 134). In his closing, the

prosecutor cited the lack of vehicle tracks from an intruder's car and the absence of an intruder's shoeprints, to demonstrate that Patty's account was implausible. (TT Vol. 4, 661, 663). In effect, the prosecutor relied on the result of an inadequate and incomplete investigation to convict Patty and created a situation in which her account could not be corroborated. Because Patty did not retain a lawyer until after she was arrested, it was not possible for her attorney to conduct a defense investigation in the crucial early days after Bill's murder.

The defense's theory of the case, besides there being no proof that Patty did this horrible crime, was that there had been an assailant in the house who murdered Bill and assaulted Patty. Patty testified at trial. She told the jury that Bill and she went out with their longtime friends for dinner and video games on the night of the murder. (TT Vol. 3, 600). Patty and Bill returned home late and Bill went to bed after checking on the children. (*Id.* at 602). Patty tidied up the kitchen and living room and then went to bed herself. (*Id.*). She told them that she had awoke to what she thought was thunder. (*Id.* at 603). In darkness, an unknown assailant pulled her from her bed by her hair, (*Id.* at 603, 623), put a knife to her throat, and attempted to rape her. (*Id.* at 623-24). The intruder left the room and Patty then checked on Bill and realized he had been shot. (*Id.* at 605). She attempted to turn on the lights and to make a call for help but neither the electricity nor the phone worked. (TT Vol. 2, 351-52; TT. Vol. 3, 631). Believing the assailant was still in the house,

Patty collected the children. (TT Vol. 3, 605-06). One of the Prewitt children, Sarah, testified that as she was leaving the house she heard a sound coming from the basement and saw a moving flashlight coming from below the door. (*Id.* at 557). Carrie Prewitt, another daughter of Bill and Patty's, testified that she heard noises coming from the basement. (*Id.* at 569). Patty got the children out of the house and into a car. (*Id.* at 607). She then went back into the house to check on Bill. (*Id.*). Finding Bill dead, she drove the children to a neighbor's house to seek help. (*Id.* at 608).

The prosecution's response to Patty's account of the evening was to attack her credibility primarily based on past extramarital affairs that had occurred years prior to Bill's murder and during a time when Patty and Bill were estranged. On a trip to Sedalia in 1974, Patty was raped by three men. (*Id.* at 582). Following this traumatic event, Bill grew more distant from Patty, they slept separately, and Patty began to see other men. (*Id.* at 583-85). By 1980, the Prewitts had reconciled and Patty did not have any further extramarital relationships. (*Id.* at 583, 593). Nonetheless, the prosecution used Patty's past affairs and insinuations about her promiscuity to move the jury.

Lead investigator Hughes described statements purportedly made by Mrs. Prewitt two days after the murder, while she was in custody for 16 hours. Hughes told the jury that Patty, in this unrecorded interview, said a number of provocative

and sexually suggestive statements including that she had extramarital relations "at least once a day and sometimes three or four times a day," that her "fire burns hotter than most people," that she would not tell the truth unless caught red-handed. (TT Vol. 2, 297, 299). Hughes claimed she asked him to take her out to dinner before she went to prison (*Id.* at 300). Mrs. Prewitt has always denied making these statements. These statements certainly had an inflammatory effect; as noted below, the circuit court judge who denied Mrs. Prewitt's motion for DNA testing incorrectly noted that, based on his recollection of attending the trial, Mrs. Prewitt herself testified that her "sexual engine burns hotter than most other people." (T 25).[3] Missouri law rightfully does not consider the moral judgement or anecdotal recollection of a defendant's sex life by policeman and other legal stakeholders to be proof of anything and now requires the recording of custodial interviews in such cases. Unfortunately, in 1984, such protections were not in place.

Further, Mrs. Prewitt's neck wounds were dismissed as self-inflicted based on problematic testimony from Dr. Bridgens, a pathologist who had been criticized for errors in other murder cases. *See, e.g.*, Bill Norton, A Difference of Opinion,

[3] References to the transcript of the March 14, 2018 hearing are denoted by "T" followed by the page of the transcript being cited. The transcript was filed with this court on June 18, 2018.

Kansas City Star Magazine, Jan. 24, 1988, at 16-17; (LF22 at 5-8, Ex. H). Bridgens testified about his observation of a photograph of the wounds on Mrs. Prewitt's neck, that they were characteristic of self-inflicted hesitation marks. (TT Vol. 2, 477.) No medical professional examined the wounds on Patty's neck or made notes as to their appearance or nature. The defense failed to call a forensic expert to counter Bridgens's claim, or inform the jury of the limits of Bridgen's conclusions, since he had not examined the injury and did not have any concomitant medical reports or observations to which he could refer.

Bridgens also testified about the manner in which Bill Prewitt could breathe after being shot. Patty had told investigators that she heard Bill breathing in a "rattly" manner for a period of time after the intruder left the bedroom. (TT Vol. 3, 630). Dr. Bridgens testified that temple shot would have rendered Bill Prewitt unconscious, but that he would have continued to live and breathe for up to a period of hours. (*Id.* at 469). Bridgens opined that the sound of Bill Prewitt breathing after this temple shot could be described as "rattly." (*Id.*). He further testified that the shot behind Bill Prewitt's ear—the wound identified after the Bill Prewitt's body was exhumed three weeks before trial—would have caused Bill to stop breathing immediately or very promptly, a matter of seconds. (*Id.* at 471). In his closing statement, the prosecutor argued that Mrs. Prewitt could only have heard Bill breathe rattly, as she claimed, after the first shot to the temple, but

before the second shot that would have stopped breathing instantly. (TT Vol. 4, 699). According to the prosecutor, since Patty told police she heard breathing after she alleged the intruder left, it was impossible that an intruder committed the murder. (*Id.*). As the prosecutor stated, "By breathing, by clinging to life, Bill Prewitt convicts this woman." (*Id.* at 699-700). In effect, the State used Bridgens's testimony to impugn Mrs. Prewitt's credibility. Yet, the defense failed to call a forensic expert to counter Bridgens's claim about Bill Prewitt's breathing or the number and location of the gunshot wounds Bill Prewitt suffered.

The State also called Ricky Mitts, with whom Patty had a relationship six years earlier, to testify that Patty offered him $10,000 to murder Bill Prewitt in the summer of 1982 (TT Vol. 2, 434-36). Remarkably, Mitts admitted in his testimony that after speaking to the police, he approached Patty and offered to marry her so he would not have to testify against her (*Id.* at 447). Mitts was married at the time and willing to divorce his current wife to marry Patty. (*Id.*). Patty was repulsed by Mitts and found this suggestion outrageous and further evidence of how crazy Ricky Mitts was (*Id.* at 590). Mitts also testified that he had been in love with Patty at the time of their affair and had wanted to marry her then (*Id.* at 448), that he had been a friend of Patty and Bill's for some time, and was aware of, and had handled the .22 caliber gun. Mitts further admitted that he had lied to the police in his first

interview with them (*Id.* at 440-442). Nonetheless, the police and prosecutor never pursued Mitts as a suspect.

In his closing, the prosecutor further attacked Patty's character, arguing she "defiled [Bill's] home with those lovers when the children were there" and "abandoned her duties as a mother" (TT Vol. 4, 698). The prosecutor claimed that the defense would have the jury believe that an intruder "advanced with his murderous manner to enjoy Mrs. Prewitt's oft-enjoyed sexual favors." (*Id.* at 657). The prosecutor told that jury that Mrs. Prewitt "disregarded her marital vows and the noticeable obligations of motherhood. She pursued one sleazy affair after another, one, two at a time" (*Id.* at 659). He instructed the jury that "[t]he dignity of the institution of marriage" required a conviction (*Id.* at 701). With that histrionic moral imperative from the prosecutor, the jury deliberated. Though the jury reported to a bailiff that they were split at one point in their deliberations, they ultimately delivered a guilty verdict. (*Id.* at 713).

Motion for Post-conviction DNA Testing

Last year, Mrs. Prewitt was surprised to learn that physical evidence secured in relation to her husband's murder remains in possession of the Johnson County Sheriff's Office, despite previous requests for information about the evidence by her attorneys. Mrs. Prewitt was the subject of a television show, *Final Appeal*, devoted to possible wrongful convictions. In the spring of 2017, NBC Peacock

Productions received a letter from Johnson County Sherriff's Office Lieutenant and Evidence Officer Andrew Gobber with a list of evidence currently held by the Sheriff's Office. (LF22 at 10-11, Ex. I). Mrs. Prewitt filed a motion for post-conviction DNA testing with the circuit court for Pettis County on November 27, 2017, requesting testing of the following items:

(1) Pajama top of Patricia Prewitt

(2) Pajama bottom of Patricia Prewitt

(3) Telephone and cord from master bedroom

(4) Telephone and cord from downstairs hallway

(5) "Veri Veri Sharp" serrated knife recovered from yard

(6) St. Regis Knife found behind cushion of love seat in family room

(7) Paring knife

(8) Brown towel

(9) Cut & pulled victim hair samples

(10) Pillow and pillow case from under victim's head

(LF20 at 1-2). A hearing was held on March 14, 2018. The circuit court denied Mrs. Prewitt's motion on May 3, 2018. This appeal follows.

POINT RELIED ON

The circuit court clearly erred in denying appellant's post-conviction motion for DNA testing pursuant to Section 547.035, because the circuit court:

1) **Did not properly assess whether a reasonable probability exists that the appellant would not have been convicted if exculpatory results were obtained through the requested DNA testing, as required under Section 547.035;**

   Belcher v. State, 364 S.W.3d 658 (Mo. Ct. App. W.D. 2012)

   Hudson v. State, 190 S.W.3d 434 (Mo. Ct. App. W.D. 2006)

   Hudson v. State, 270 S.W.3d 464 (Mo. Ct. App. S.D. 2008)

   Weeks v. State, 140 S.W.3d 39 (Mo. 2004)

2) **Erroneously applied the standard for release under Section 547.037 not the standard for testing under Section 547.035, and;**

   Weeks v. State, 140 S.W.3d 39 (Mo. 2004)

   Mo. Rev. Stat. § 547.035

   Mo. Rev. Stat. § 547.037

3) Relied on factual errors and extrajudicial information in reaching its decision, thus failing to appear impartial in assessing Appellant's motion.

Anderson v. State, 402 S.W.3d 86 (Mo. 2013)

Mo. Sup. Ct. R. 2-2.11(A)

STANDARD OF REVIEW

"Denial of a post-conviction motion for DNA testing is reviewed to determine whether the motion court's findings of fact and conclusions of law were clearly erroneous." *State v. Belcher*, 317 S.W.3d 101, 104 (Mo. Ct. App. S.D. 2010) (quoting *State v. Ruff*, 256 S.W.3d 55, 56 (Mo. 2008)). "The motion court's findings and conclusions are clearly erroneous only if, after review of the record, 'the appellate court is left with the definite and firm impression that a mistake has been made.'" *Id*. (quoting *Weeks v. State*, 140 S.W.3d 39, 44 (Mo. 2004)).

ARGUMENT

The circuit court clearly erred in denying appellant's post-conviction motion for DNA testing pursuant to Section 547.035, because the circuit court did not properly assess whether a reasonable probability exists that the appellant would not have been convicted if exculpatory results were obtained through the requested DNA testing. Instead, the circuit court erroneously applied the standard for

ordering release under Section 547.037 rather than the required standard for ordering testing under Section 547.035 and relied on factual errors and extrajudicial information in reaching its decision, thus failing to appear impartial in assessing Appellant's motion.

I. The Circuit Court Clearly Erred When It Did Not Properly Assess Whether A Reasonable Probability Exists That The Appellant Would Not Have Been Convicted If Exculpatory Results Were Obtained Through The Requested DNA Testing, As Required Under § 547.035.

The circuit court's denial of DNA testing was clearly erroneous, as Mrs. Prewitt has satisfied all the requirements for testing. A motion for post-conviction DNA testing must allege facts under oath demonstrating that:

(1) There is evidence upon which DNA testing can be conducted; and

(2) The evidence was secured in relation to the crime; and

(3) The evidence was not previously tested by the movant because:

(a) The technology for the testing was not reasonably available to the movant at the time of the trial;

(b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or

(c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and

(4) Identity was an issue in the trial; and

(5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

Mo. Rev. Stat. § 547.035.2.

Mrs. Prewitt has clearly met this standard, and as articulated in her motion below (LF20 at 1-26), is entitled to DNA testing. Indeed, the State did not dispute that Mrs. Prewitt met the requirements of 547.035.2 (1)-(4) in either its response to the motion for testing (LF27) or during the hearing on the motion. Nor did the Circuit Court find that Mrs. Prewitt had not met requirements (1)-(4) in its findings of fact and conclusions of law. (LF29; App. A3-A8). As a result, the only requirement at issue is whether Mrs. Prewitt had satisfied subsection (5)—whether a reasonable probability exists that Mrs. Prewitt would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

In assessing whether "a reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing" under § 547.035.7, this Court and the Missouri Supreme Court have considered what the possible impact of such results would have been on the jury. *See Weeks v. State*, 140 S.W.3d 39, 49 (Mo. 2004) ("If the DNA does not match Mr. Weeks' DNA, and if a jury were made aware of this fact, there is a

reasonable probability that he would not be convicted because a jury could find that the perpetrator did ejaculate and that someone other than Mr. Weeks was the source of the intact sperm on the vaginal swab and on the victim's pants."); *Hudson v. State*, 190 S.W.3d 434, 443 (Mo. Ct. App. W.D. 2006) ("The jury, in convicting the appellant of murder and ACA, knew full well that the DNA profile found on the cigarette butt did not match the DNA profile of the appellant or the victim.")

However, the circuit court refused to weigh what the impact of exculpatory DNA results on the jury. In its decision, the circuit court stated:

> The defendant's pleading also argues evidence from DNA testing would be sufficient to cause substantial doubt on the State's evidence at trial and would provide a reasonable probability that a jury would not have convicted Patty if such corroborating results were presented during trial. The Court cannot understand how defense counsel can be so sure what a petit jury would probably do. The only way to determine that is to retry the case.

(LF29 at 5; App. A7). This was error. The plain language of § 547.035.7 necessarily *requires* an assessment of the impact of exculpatory results obtained through DNA testing on the jury's decision to convict. Indeed, this is precisely the type of inquiry courts perform in all post-conviction cases. *Weeks*, 140 S.W.3d at

49; *Belcher v. State*, 364 S.W.3d 658, 664 (Mo. App. W.D. 2012); *Hudson v. State*, 270 S.W.3d 464 (Mo. Ct. App. S.D. 2008). Yet, the circuit court wholly refused to even begin such an inquiry here. By failing to assess what the impact of exculpatory results obtained through DNA testing would have on the jury, the circuit court clearly erred.

If the circuit court had assessed the impact of exculpatory evidence on the jury, it would have found that a reasonable probability exists that Mrs. Prewitt would not have been convicted had it been presented with exculpatory DNA results. At trial, the jury was told that there was "not one shred of evidence" supporting Mrs. Prewitt's account, other than her testimony. (TT Vol. 4, 661). Indeed, the jury was led to believe there was no intruder based on the absence of tire tracks and footprints (*Id.* at 661, 663), even though the absence of evidence is not evidence of absence. The inadequate investigation was used to further undermine Mrs. Prewitt's credibility. If the jury had been made aware of DNA evidence that countered the State's theory, there is a reasonable probability that Mrs. Prewitt would not have been convicted. For example, suppose that ejaculate is found on Mrs. Prewitt's pajamas that matches the DNA profile of DNA extracted from a knife recovered from the crime scene and a convicted murderer in the FBI CODIS database. That would have mattered to a jury. This is particularly true in a case like here, where both parties stipulated to the fact that during deliberations the

jury orally informed the bailiff that they were split. (*Id.* at 713). It is hard to imagine that such evidence would not have created enough reasonable doubt in the mind of at least one juror so that Mrs. Prewitt would not have been convicted. By refusing to consider the impact exculpatory DNA evidence would have had on the jury's decision to convict Mrs. Prewitt, the circuit court clearly erred.

A. DNA testing could provide exculpatory results

In her motion for testing, Mrs. Prewitt requested testing of certain items secured by investigators in relation to the crime for which she was convicted, including:

(1) Pajama top of Patricia Prewitt

(2) Pajama bottom of Patricia Prewitt

(3) Telephone and cord from master bedroom

(4) Telephone and cord from downstairs hallway

(5) "Veri Veri Sharp" serrated knife recovered from yard

(6) St. Regis Knife found behind cushion of love seat in family room

(7) Paring knife

(8) Dirty brown towel

(9) Cut & pulled victim hair samples

(10) Pillow and pillow case from under victim's head[4]

(LF20 at 1-2).

Testing of these items, not just individually, but taken together, would—when viewed in light of the evidence and the State's theory presented at trial—have clearly established a reasonable probability of a different outcome.

For example, a DNA profile developed from Mrs. Prewitt's pajamas and any foreign hairs found on Mrs. Prewitt's pajamas could provide exculpating evidence. Mrs. Prewitt testified that the intruder attempted to rape her, (TT Vol. 3, 624), an assertion that in closing, the prosecutor dismissed as incredible. (TT Vol. 4, 659). The prosecutor explained to the jury that "there's not one shred of evidence, not one shred of evidence before you other than Mrs. Prewitt's testimony that refutes" the prosecution's theory that Patty lied about the intruder and murdered Bill. (*Id.* at 661). However, DNA evidence could do just that. If Patty's pajamas contain a third party's DNA, either through ejaculate, the foreign hairs, or touch DNA on the clothing, this would corroborate Patty's account and bolster her credibility. Indeed, a redundant profile between ejaculate and the cut cords could definitively identify the perpetrator if that profile is suitable for upload into the offender database and produces a hit to someone in that database.

[4] DNA taken from Bill Prewitt's pillow and pillow case would be used to identify his DNA and eliminate him as the source of DNA from the results of testing done on the other items.

Similarly, a DNA profile developed from the telephone and telephone cords could also provide exculpating evidence. In his closing, the prosecutor told the jury that Patty cut the cord on the phone line. (*Id.* at 660). The DNA profile of an unknown male found on those phone cord pieces would corroborate Patty's account and prove that an intruder entered the Prewitt home that night. So too could a DNA profile developed from the knives. The State's theory as presented to the jury in closing argument was that the wounds on Patty's neck were self-inflicted. (*Id.*). The knives recovered from the crime scene may have DNA from the intruder and prove that Patty did not wield the knife on herself.

Most importantly, a common unknown DNA profile developed from two or more pieces of evidence would provide exculpating evidence as it would confirm that the same individual—who was not Mrs. Prewitt—touched all of the evidence used or touched during the commission of the crime. If a redundant DNA profile of someone who did not live at the Prewitt home is developed from two or more of the items that were taken from the crime scene, this would corroborate Mrs. Prewitt's account that an intruder murdered her husband because it would demonstrate that the same individual touched the items thought to be used by the perpetrator of the crime. For example, if a DNA profile developed from the phone cord is the same as a DNA profile developed from one of the knives and is also the same DNA profile developed from Mrs. Prewitt's pajamas, this would provide a

compelling argument that an intruder committed the crime. At the hearing, the circuit court found this concept to be "intriguing . . . because there's some logic to that." (T 23). However, the circuit court did not address the possibility of redundant DNA profiles in its decision. Indeed, if found, a redundant DNA profile on multiple pieces of evidence would establish that there was a reasonable probability that Mrs. Prewitt would not be convicted because the presence of such evidence would have bolstered Ms. Prewitt's credibility, supported her assertion of an intruder, and overcome the State's theory that there was no one else who could have committed the crime.

Finally, if a DNA profile developed from evidence taken from the crime scene is matched to a DNA profile in a criminal DNA database, particularly an individual not otherwise associated with the Prewitts with similar prior convictions, the true perpetrator could be definitively identified. As noted in her motion below (LF20 at 1-26), DNA from the physical evidence secured in relation to the crime can be uploaded in the Combined DNA Index System (CODIS) or state offender database. If the DNA profile developed from the evidence matches that of a convicted murder or rapist, this would provide exculpatory evidence as it would confirm that someone who had a history of crimes like the murder of Bill Prewitt was in the home at the time of the crime. This would be particularly true if the individual was unknown to Bill and Patty Prewitt and had no reason to be in

the home. Had the jury heard such DNA evidence, particularly in a case like here, where the jury was at some point split in its deliberations, (TT Vol. 4, 713), there is a reasonable probability it would have credited Patty's story and found her not guilty.

Here, the circuit court wholly failed to conduct any such analysis. This was error. The State's theory of the case relied on convincing the jury Mrs. Prewitt was lying about an intruder and lying about the circumstances of the attack. Exculpatory DNA evidence could both confirm the presence of an intruder, bolstering Mrs. Prewitt's credibility, and more importantly, could definitively identify the perpetrator, overcoming all of the improper character evidence mounted by the State. Had the circuit court conducted the required inquiry, it would have found that Mrs. Prewitt was entitled to DNA testing.

II. The Circuit Court Erred When It Erroneously Applied The Standard For Release Pursuant To § 547.037, Rather Than The Requisite Standard For DNA Testing Under § 547.035.

Not only did the circuit court fail to consider whether or not Ms. Prewitt had established a reasonable probability of a different outcome, it also applied the incorrect standard in rendering its decision. Pursuant to § 547.035.7, "The court shall order appropriate testing if the court finds: (1) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been

obtained through the requested DNA testing; and (2) That movant is entitled to relief." Despite this clear directive, the circuit court focused instead on whether or not DNA testing could prove Mrs. Prewitt's innocence—the standard to order release under § 547.037 *after* testing is performed under § 547.035. In doing so, the circuit court incorrectly concluded that Mrs. Prewitt was not entitled to DNA testing under § 547.035.

Because § 547.037 addresses relief for the movant *after* testing has been performed, the standard differs significantly from the standard *before* testing is ordered under § 547.035. A decision to order testing requires a finding of a reasonable probability that the movant would not have been convicted, not conclusive proof of innocence. Under § 547.037, "If the court finds that the testing ordered pursuant to § 547.035 demonstrates the movant's innocence of the crime for which he or she is in custody, the court shall order the movant's release from the sentence for the crime for which the testing occurred." *Id*. This is a far cry from the standard of a reasonable probability for a different outcome as required under § 547.035 to simply achieve testing.

Yet, while the statute is clear, the circuit court was not. Despite the circuit court's acknowledgement that Mrs. Prewitt seeks testing (as no testing has yet been performed), the circuit court repeatedly holds Mrs. Prewitt's motion for testing under § 547.035 to the standard necessary for release under § 547.037. Nearly each

page of the circuit court's six page findings of fact and conclusions of law includes a reference to or application of the incorrect § 547.037 standard:

- "The ultimate question then is whether DNA testing proves that Patricia Prewitt is innocent." (LF29 at 2; App. A4).
- "The evidence required to acquit and release a defendant after conviction by the use of §§ 547.035 and 547.037 must unequivocally exonerate the movant." (LF29 at 3; App. A5).
- DNA on the items sought to be tested "do[] not prove innocence." (LF29 at 4; App. A6).
- "It is required that conclusive DNA proof will show innocence." (LF29 at 5; App. A7).
- "The burden on the defendant to prove that DNA test results would show that she is innocent has not been satisfied." (LF29 at 6; App. A8).

Yet, the burden on Mrs. Prewitt was to show that "a reasonable probability exists that [she] would not have been convicted if exculpatory results had been obtained through the requested DNA testing." § 547.035. While the circuit court's decision includes a single conclusory sentence that Mrs. Prewitt did not meet the standard under § 547.035, it conducted no analysis of that standard. Instead, the circuit court immediately applied the standard under § 547.037:

> The Court cannot find that a reasonable probability exists that Ms. Prewitt would not have been convicted if exculpatory results had been obtained through DNA testing. Most importantly, the finding of another's DNA on the items she seeks tested does not prove she did not kill her husband. This is not an appeal. It is required that conclusive DNA proof will show innocence.

(LF29 at 5; App. A7).

This is clear error. The circuit court's conclusion squarely contradicts § 547.035 and Missouri Supreme Court precedent. In *Weeks*, the Missouri Supreme Court reversed a lower court's denial of a movant's motion for DNA testing under § 547.035. The Court acknowledged, "To be entitled to such testing, the movant need not conclusively prove his innocence." *Weeks*, 140 S.W.3d at 50. Therefore, requiring that Mrs. Prewitt conclusively prove her innocence is clearly erroneous. Further, as highlighted below, had the circuit court conducted an analysis into whether Mrs. Prewitt showed that a reasonable probability exists that she would not have been convicted if exculpatory results had been obtained through DNA testing, the circuit court would have concluded that Mrs. Prewitt was entitled to DNA testing.

III. The Circuit Court Clearly Erred By Relying On Factual Errors And Extrajudicial Information And Thus Failing To Appear Impartial In Assessing Appellant's Motion.

During the March 14, 2018 hearing the circuit court judge noted that he remembered the Prewitt case and attended portions of the trial in 1985. (T 24). Appellant was unaware that the circuit court judge had any personal knowledge of this case prior to this hearing. As described below, the circuit court incorrectly recounted important aspects of Mrs. Prewitt's testimony at the hearing and in its decision denying Mrs. Prewitt's motion. This was clear error. Indeed, the circuit court judge relied on factual errors stemming from extrajudicial experiences and sources and gratuitously offered personal opinions on Mrs. Prewitt's credibility in such a manner that his impartiality might reasonably be questioned. As a result, recusal was required pursuant to Mo. Sup. Ct. R. 2-2.11(A).

Rule 2-2.11(A)(1) requires that a judge recues himself when "the judge's impartiality might reasonably be questioned" because "[t]he judge has a persona bias or prejudice concerning a party. . . *or knowledge of facts that are in dispute in the proceeding that would preclude the judge from being fair and impartial*." *Id.* (emphasis added). When considering Rule 2-2.11(A), the Missouri Supreme Court has stated that "a disqualifying bias or prejudice is one that has an *extrajudicial source* and results in an opinion on the merits on some basis other than what the

judge learned from the *judge's participation* in a case." *Anderson v. State*, 402 S.W.3d 86, 91 (Mo. 2013) (quoting *Worthington v. State*, 166 S.W.3d 566, 579 (Mo. banc 2005)) (internal citations omitted). "The rule is not limited to actual prejudice and also requires recusal when 'a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court.'" *Anderson*, 402 S.W.3d at 91 (quoting *State v. Smulls*, 935 S.W.2d 9, 17 (Mo. banc 1996)). That is precisely what happened here.

Here, the circuit court recounted his personal knowledge at the hearing, which was not only an improper source of information, it was also an inaccurate. Those inaccuracies on their own cast doubt on the impartiality of the judge. When coupled with the already inflammatory language surrounding Mrs. Prewitt's reputation, there can be no question that recusal was required. It makes no difference whether the inaccuracies were the product of memory or malice—the impartiality of a judge cannot be left to question, and recusal was required.

At the hearing on Mrs. Prewitt's Motion for Post-conviction DNA Testing, the circuit court judge openly noted that he had outside information, stating: "I remember this. I was a young judge when this case was going on. I heard some of the evidence." (T 24). He continued:

THE COURT: Do you remember testimony of that about -- here's the unique part of this case that everybody in this town knows about, that -- she testified, right?

MS. BUSHNELL: Yes, Your Honor.

THE COURT: And she said upon cross-examination that her sexual engine is hotter than most other people, or some words to that effect. That's in -- that was testified to, because I remember that.

MS. BUSHNELL: Your Honor, she doesn't testify -- she doesn't testify to that, that is --

THE COURT: Somebody did.

MS. BUSHNELL: The Prosecutor makes argument as to that.

THE COURT: No, no. She said it.

MR. REICHART: Your Honor, if I may. The lead investigator on the case asserted that she said that.

THE COURT: Okay. That may be, but I heard that testimony and that -- that's been remembered because that makes this case unique.

(T 24-25)

The circuit court judge's recollection was incorrect. It was indeed lead investigator Kevin Hughes who testified that Mrs. Prewitt stated in an unrecorded interview that Prewitt said she had sex "at least once a day, sometimes three or

four times a day" because her "fire burns hotter than others." (TT Vol. 2, 297). When asked on cross-examination whether she said this, Prewitt responded, "I can't imagine ever saying a statement like that." (TT Vol. 3, 615).

The circuit court's decision does not include a single citation to the trial transcript. This is problematic because the circuit court incorrectly described Mrs. Prewitt's testimony in reaching the conclusion that she was not entitled to DNA testing. In its opinion, the circuit court further stated:

> The defense seeks DNA testing of the pajama bottoms that Ms. Prewitt was wearing the night of the murder. They see a picture suggesting a stain and want to test it. Ms. Prewitt's testimony was that they were removed from her *before* the perpetrator got on top of her. Any stains that were on that item of clothing could not have come from the alleged perpetrator.

(Emphasis added) (LF29 at 4; App. A6).

This statement is incorrect for two reasons. First, even if the pajama bottoms were removed before the perpetrator got on top of Mrs. Prewitt, seminal fluid could indeed have ended up on the pajama bottoms when Mrs. Prewitt put them back on. It is wrong for the circuit court to say definitively that the stain could not have come from the perpetrator. Second, the circuit court's description of Mrs.

Prewitt's testimony is incorrect. In fact, Mrs. Prewitt testified that the pajama bottoms were removed *after* the perpetrator got on top of her:

> [Defense Attorney]: Tell us how you were awoken?
>
> [Mrs. Prewitt]: I thought I heard thunder and someone had ahold of my hair, and I grabbed my hair and it's hard for me to explain because it all happened very quickly, and from a dead sleep I don't know --
>
> [Defense Attorney]: Tell me. Someone grabbed your hair then what happened?
>
> [Mrs. Prewitt]: And he pulled me out of bed, and I was on the floor and he was on top of me, holding me down.
>
> [Defense Attorney]: What did you do when he held you down?
>
> [Mrs. Prewitt]: I felt something sharp at my throat but it didn't hurt, it was just there. I didn't know what -- my mind was so -- I was going crazy, where was Bill, where were the kids, what was going on; was this a dream; was this a nightmare. This couldn't be real. None of it seemed real. I couldn't get a grasp on my reality. Then he pulled my pajama bottoms and panties off and was fumbling with his belt. I could feel the cold belt buckle -- it sounds so slow when I say it.

(TT Vol. 3, 624).

The circuit court also inaccurately recounted Mrs. Prewitt's testimony regarding the manner in which she woke up. The circuit court wrote, "She testified that the shots are what woke her up." (LF29 at 4; App. A6). In fact, Mrs. Prewitt testified that she awoke to what she thought was thunder. (TT Vol. 3, 603). On cross, the prosecutor asked her if she awoke to the sound of two guns shots, Prewitt responded "I don't know for sure." (TT Vol. 3, 622).

From the above, it is clear that the circuit court, at a minimum, began this case with an incorrect negative recollection about Mrs. Prewitt's testimony—a recollection that the circuit court judge insisted was correct when counsel initially tried to correct him,[5] and a recollection that the circuit court judge claimed was a "unique part of this case that everybody in this town knows about." (T 25).

In addition, given the factual inaccuracies in the circuit court's decision, it is clear that the circuit court is relying on personal recollection rather than the evidence presented in front of him. This was error.

Where, like here, the judge oversteps the evidence presented in front of him, the appearance of bias is inevitable. Indeed, the circuit court gratuitously inserted its own personal opinions in its decision writing, "It is this Court's opinion that one

[5] As noted above, when Mrs. Prewitt's counsel sought to correct the circuit court's inaccurate statement, the circuit court judge responded, "No, no. She said it." (T 25).

of the reasons the jury found Ms. Pruitt [sic] guilty was because she was caught in so many lies." (LF29 at 6; App. A8). Further, without having conducted any of the analysis as required under § 547.035, the circuit court gratuitously and erroneously added, "You cannot believe her story, and DNA findings of any kind do not change that fact." (LF29 at 6; App. A8).

Such commentary does not provide the appearance of impartiality. In a post-conviction setting, where a court is tasked with assessing the effect of potential DNA results on the outcome of the case, it is inappropriate and problematic for a judge to appear less than impartial. As noted above, a key impact of exculpatory results for the purposes of assessing whether Mrs. Prewitt would not have been convicted would be that Mrs. Prewitt's credibility would have been bolstered in the mind of the jurors. Here, where the judge incorrectly recounted that Mrs. Prewitt made a damaging inflammatory remark on the witness stand—a statement that she actually denied—and where that judge has his mind made up about Mrs. Prewitt's guilt despite "DNA findings of any kind," it is reasonable to conclude that the judge cannot fairly assess the impact of exculpatory DNA results on the outcome of Mrs. Prewitt's case. The circuit court clearly erred by relying on factual errors to deny Mrs. Prewitt's motion. Further, the circuit court judge's failure to follow the law at hand coupled with his inaccurate recollections about the matter at hand call into question his impartiality and his failure to recuse himself was clear error.

CONCLUSION

WHEREFORE, for the foregoing reasons, Ms. Prewitt prays this Court reverse the denial of her post-conviction motion for DNA testing and grant any other relief consistent with the ends of justice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 17, 2018, an electronic copy of the foregoing Appellant's Statement, Brief and Argument was sent through this Court's e-Filing system to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06, counsel certifies that this brief complies with the limitations contained in Western District Special Rule 41. Based upon the information provided by the undersigned counsel's word processing program, this brief contains 8876 words.

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